IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
October 30, 2007 Session

STATE OF TENNESSEE v. MATTHEW JOSEPH CARTER

Appeal from the Criminal Court for Knox County
No. 799909C Mary Beth Leibowitz, Judge

No. E2006-01265-CCA-R3-CD - Filed April 9, 2008

The Appellant, Matthew Joseph Carter, was convicted by a Knox County jury of one count of second degree murder, two counts of attempted second degree murder, and one count of aggravated assault. Carter was sentenced to twenty-three years for second degree murder, eleven years for each conviction of attempted second degree murder, and six years for aggravated assault. Based upon the imposition of partial consecutive sentencing, Carter received an effective sentence of forty years in confinement. On appeal, Carter challenges both his convictions and his resulting sentences upon the following grounds: (1) his convictions for second degree murder and two counts of attempted second degree murder are void because they were obtained as lesser-included offenses of the greater charged offense of "first degree murder by destructive device or bomb," which is an "invalid" charge under the facts; (2) "the jury panel's prior knowledge of the case" resulted in the denial of a fair trial and a violation of due process; (3) the trial court erroneously instructed the jury with regard to the requisite mental state of "knowingly"; (4) the evidence is insufficient to support each of the convictions; (5) the length of the respective sentences is excessive, and the trial court erred in imposing consecutive sentences. After review, we conclude that Carter's challenges to his convictions are without merit. Accordingly, each of the convictions is affirmed. We conclude, however, with regard to sentencing, that because Carter was sentenced under the June 7, 2005 sentencing amendments for crimes committed under the pre-2005 sentencing provisions, without a proper execution of a waiver of his *ex post facto* protections, remand for a sentencing hearing is required. Moreover, because the sentencing record fails to demonstrate the requisite considerations for the imposition of consecutive sentencing, this issue is also remanded for reconsideration.

Tenn. R. App. P. 3; Judgments of the Criminal Court Affirmed in Part;
Reversed in Part and Remanded

DAVID G. HAYES, J., delivered the opinion of the court, in which DAVID H. WELLES and NORMA MCGEE OGLE, JJ., joined.

Bruce E. Poston, Knoxville, Tennessee, for the Appellant, Matthew Joseph Carter.

Robert E. Cooper, Jr., Attorney General and Reporter; John H. Bledsoe, Assistant Attorney General; Randall E. Nichols, District Attorney General; William Crabtree and Jo Helm, Assistant District Attorneys General, for the Appellee, State of Tennessee.

OPINION

Factual Background

On June 22, 2004, a Knox County grand jury returned a thirteen-count presentment against the Appellant and his co-defendants, Alford Morgan and Jeremy Kelley. The presentment charged the Appellant and other defendants with the following offenses: first degree premeditated murder of Barbara Weimer; first degree murder of Barbara Weimer by the unlawful throwing of a destructive device; attempted first degree premeditated murder of Melissa Grande; attempted first degree murder of Melissa Grande by the unlawful throwing of a destructive device; attempted first degree premeditated murder of Christopher Grande; attempted first degree murder of Christopher Grande by the unlawful throwing of a destructive device; aggravated assault by use of a deadly weapon as to Melissa Grande; aggravated assault by use of a deadly weapon as to Christopher Grande; two counts of reckless endangerment committed with a deadly weapon as to Christopher and Melissa Grande; aggravated assault by use of a deadly weapon as to Gregory Dockins; and two counts of reckless endangerment committed with a deadly weapon as to Gregory Dockins. The charges stemmed from events occurring in the early morning hours of May 24, 2004.

At trial, Knox County Sheriff's Department patrol officer Robert Cole testified that, in the early morning hours of May 24, 2004, he received a call reporting that shots had been fired at the Brushy Valley overpass at Interstate 75 in northern Knox County. When he arrived at the scene, he saw the Grandes' Pontiac Aztec rental van pulled onto the side of the road. After approaching Christopher and Melissa Grande, Cole observed the victim, Barbara Weimer, on the ground. Cole testified that the victim's "face was gone" and that he could not detect her pulse. In attempting to determine whether shots had been fired, Cole looked inside the vehicle and saw a rock with blood on it in the passenger side floorboard. When the ambulance arrived, the responding medical personnel were unsuccessful in their attempts to resuscitate the victim, and they transported her to the hospital.

Cole recalled that, immediately prior to receiving a report of the incident involving the Grandes, another incident had been reported in which an object had been thrown from the same Brushy Valley overpass, striking a tractor trailer and knocking off one of its very large rearview mirrors. The driver of the tractor trailer, Gregory Dockins, had stopped at the next exit, which was Raccoon Valley, and called law enforcement. Cole testified that he visited this location and spoke with Dockins.

Larry Moore, of the Knox County Sheriff's Department, testified that he responded to a call at the Brushy Valley overpass and briefly investigated the Grandes' vehicle with a forensic expert. He then traveled north to the Raccoon Valley exit where he spoke with Dockins and observed the

damage to the truck. Moore determined that the tractor trailer incident had occurred before the incident involving the Grandes' vehicle. Crime scene technician Angela Varner testified that she took photographs of the Grandes' vehicle and the surrounding area. She identified the rock retrieved from the Grandes' vehicle and testified that the rock weighed approximately ten pounds. Varner also collected a "four-by-four" piece of wood that she found near the median on the interstate.

Lieutenant Michael Grissom of the Knox County Sheriff's Office testified that he arrived at the scene and observed the Grandes' vehicle with a hole in the passenger's side of the windshield and the rock in the floorboard. A search of police reports on the same date revealed that a number of vehicles, mailboxes, and store windows were reported vandalized in the north side of Knox County. Grissom testified that the following day, he traveled to the Norris Police Department and spoke with James Wright, who had voluntarily appeared at the police station with information regarding the death of Ms. Weimer. After this conversation with Wright, whom Grissom claimed to have found credible, the police began looking for the Appellant, another male named "Jeremy," and a third individual. The Appellant was located at his mobile home and brought in for questioning. Officers also located the Appellant's cousin, Jeremy Kelley, and Alford Morgan, both of whom would later be charged with the same crimes as the Appellant.

Knox County Sheriff's Department Sergeant Jeanette Harris testified that she was assigned to interview the Appellant, Kelley, and Morgan. After the Appellant signed a waiver of his *Miranda* rights, he was interviewed by Sgt. Harris. The videotaped statement of the Appellant, which was approximately one hour long, was played for the jury at trial. In his statement to officers, the Appellant admitted that he was the driver of a white Astro van during the evening and early morning hours of May 23-24, 2004. He stated that on the evening of May 23, he and James Wright left a cookout, and he drove to his cousin Jeremy Kelley's house, where they met Kelley and his friend Alford Morgan. The foursome then proceeded to a location to return the Appellant's "Firebird automobile" to his residence. However, because the vehicle was inoperable, the plan was eventually abandoned. After stopping to urinate at a construction site, Kelley and Morgan began loading "rocks" and "blocks" from the site into the van. The Appellant explained that Kelley and Morgan informed him that they were going to have some "redneck fun." The "fun" first began by throwing rocks at mailboxes, then progressed to throwing rocks at parked cars. The Appellant stated that, because the Astro van had a sliding door, the rocks could be thrown from inside the van while it was moving. The Appellant stated that the group had no particular "destination," that they were "just riding around." He stated that he was not familiar with the area and that Kelley gave directions.

The Appellant related that he crossed the overpass of the interstate twice. He stated that, at Kelley's request, he stopped the van, at which point Kelley and Morgan got out. Although the Appellant's statement was at times conflicting, he admitted that he saw Kelley throw a four-by-four wooden "block" at a large truck from the overpass and also saw Morgan throw a large rock from the overpass. The Appellant stated that the four-by-four wooden block and the large rock were kept in the van for use in changing tires. The Appellant denied throwing any objects from the van and stated that he repeatedly warned both Kelley and Morgan not to throw anything from the overpass.

Dockins, the driver of the truck, testified that around 1:40 a.m. on May 24, 2004, he was traveling north on Interstate 75. As he approached the Brushy Valley overpass, he noticed "a white Astro van sitting on the bridge with its lights on pointing east . . . sitting still." As he drove under the overpass, his left rearview mirror was ripped off the truck. Dockins stated, "It took me a few minutes to figure out that something was thrown off the bridge and took my mirror off." He managed to keep the truck under control and, after traveling another mile or so, pulled off to the side of the road at the Raccoon Valley exit ramp and called the authorities.

Christopher Grande testified that he, his wife Melissa, and his mother-in-law, decedent Barbara Weimer, were traveling north on Interstate 75 in a Pontiac Aztec rental vehicle between 1:35 and 1:40 a.m. on May 24, 2004. The three were returning home from the Grandes' nephew's high school graduation in West Virginia. Mr. Grande was in the driver's seat, while Ms. Grande sat in the backseat of the vehicle, and Ms. Weimer slept sitting upright in the passenger seat with her small dog in her lap. As they approached the Brushy Valley overpass, Grande recalled that something came through the windshield, and he thought that there had been a gunshot. When he looked over at Ms. Weimer, he saw that her face "was just totally destroyed" and that there was blood all over the interior of the vehicle. He was able to stop and call 911, and he noticed the rock that had landed in the floorboard. He followed the instructions given to him by the 911 operator and moved his mother-in-law, who was taking deep breaths, onto the side of the road in order to attempt CPR. At that point, Officer Cole arrived at the scene. Ms. Weimer was transported to U.T. Medical Center, where she was pronounced dead.

Knox County Medical Examiner and forensic pathologist, Dr. Sandra Elkins, testified regarding the ultimately fatal injuries sustained by Ms. Weimer. Based upon her autopsy of the victim, Dr. Elkins determined that the cause of death was "blunt force head and neck injuries." Specifically, the base of the victim's skull had separated from the top of her spine, and she suffered multiple fractures resulting in aspiration of blood into her lungs. Dr. Elkins opined that death occurred rapidly; however, the victim did breathe long enough to get aspiration of blood, from the fractures of facial bones, into the lungs.

The defense called witness James Wright[1] to testify about the events that occurred on May 24, 2004. Wright testified that he was friends with the Appellant, but that prior to that date, he had not seen him in a couple of years. Wright encountered the Appellant on May 23 at a gas station, and he invited the Appellant and his girlfriend to cook out with him and his wife that evening. After dinner, according to Wright, he and the Appellant left Wright's home in a white Astro van, and they planned to "pick up some motors" at the home of the Appellant's girlfriend's father. They first stopped at the home of the Appellant's cousin, Jeremy Kelley. Also present at Kelley's house was Kelley's friend, Alford Morgan. These two men joined the Appellant and Wright in the white Astro van. Wright testified that he sat in the passenger seat, while the Appellant drove, and Kelley and Morgan sat in the back of the van. At some point, they decided not to pick up the motors, and, around 9:00 p.m., the group of young men "went riding around for awhile." Wright stated that the

[1] Wright was not charged with any crimes in this case.

Appellant drove "a little close to some mailboxes" and that Kelley, reaching out of the large sliding door from the back of the van, employed some type of stick or baton to "smack" mailboxes.

According to Wright, around 10:00 p.m., the group stopped at a construction site, where Kelley and Morgan got out and loaded some pieces of rocks and bricks into the van and threw some rocks through the windows of construction equipment. They then left the construction site, and, as they passed a gas station, Kelley asked the Appellant to stop the van, which he did. At that point, either Kelley or Morgan threw a rock through the gas station window. The group continued to drive around and throw rocks and bricks at parked cars and mailboxes. Wright claimed that he threw some rocks at mailboxes and that the Appellant threw a rock out the window at an oncoming vehicle. Wright testified that, during this time period, the Appellant drove while Kelley gave him directions, such as, "[t]urn here and there." Wright stated that the van reached the Brushy Valley overpass, and as they drove over the interstate, Kelley and Morgan "slung some rocks out the side door" without getting out of the van. According to Wright's testimony, they turned around and drove onto the overpass a second time, and Kelley asked the Appellant to stop the van. Wright claimed that the Appellant said "no" and kept the van moving, looking ahead as an oncoming vehicle approached. Wright contended that he looked in the rearview mirror and saw Kelley and Morgan jump out of the van. He testified that "[o]ne of 'em had a rock and one of 'em had a [four] by [four]." Wright testified that the Appellant stated, "This is stupid." Wright testified that as the van was still moving, Kelley and Morgan ran back towards the van and jumped back in. Wright stated that Kelley and Morgan were laughing, and that he heard one of them say the board that they threw "hit a tractor and trailer." Wright testified that he did not remember either man say anything about hitting a car or SUV. Wright testified that the Appellant "seemed a little upset about it" and that when Kelley asked the Appellant to drive to a subdivision, the Appellant looked at Wright "and kind of acted like he really didn't want to but he did."

Wright testified that the foursome then went to the subdivision where more rocks were thrown at parked cars. Afterwards, Wright asked the Appellant to take him home, and the Appellant replied that "he was ready to go home too." Shortly thereafter, Wright recalled that they were approached by "some girl" who had been following the group, claiming that the van being driven by the Appellant had been stolen from her grandfather. The girl discussed this with the Appellant, who asked her to follow him to his home where she could get the van. Wright stated that he rode with the girl back the Appellant's trailer. Wright said that once they arrived there, he "got [his] wife and kid" and left. He testified that as he was getting off from work the next day, he found out that someone had been killed that night. Wright contacted one of his relatives, who was in law enforcement, and he subsequently talked to the police about the night's events.

At the close of the defense proof, the State called Amanda Mourray as a rebuttal witness. Mourray testified that while driving her car in the early morning hours of May 24, 2004, she spotted a white Astro van, which she claimed belonged to her grandparents and had been missing for about a month. Mourray testified that she "started tailing [the van] immediately" until the van pulled into a parking spot at an apartment complex. Approaching the van, which was occupied by four males, she rolled down her window and asked the driver, whom she identified as the Appellant, where he

had gotten it, and the Appellant responded that he had bought the van from a man whom Mourray identified as her brother. Mourray testified that she smoked marijuana with the group of males to neutralize the situation and "to get the van in [her] possession without involving the police." Mourray testified that one of the males got into her vehicle and rode as she followed the van and its passengers to a trailer residence in Halls, where the seats to the van were located. Mourray testified that both the wife of the male who accompanied her and the Appellant's girlfriend were present at the trailer. She stated that the Appellant's girlfriend was very angry, apparently upset that "[s]hould [Mourray] take the van back to [her] grandparents' property, they would lose the $ 900 that they had paid for it." Mourray testified that the Appellant and his girlfriend followed her to her grandparents' house, where the van was returned. Mourray then made arrangements to take them home. Mourray recalled that she had planned to take a specific route for this trip but that the Appellant insisted on returning by way of an interstate overpass. Mourray testified that as they approached an interstate overpass, at about 5:15 a.m., she saw a news camera crew and "a tripod angled down." She stated that the Appellant "started laughing hysterically and saying, 'I know what that's about. We fucked shit up tonight.'" Mourray testified that they returned to the trailer residence in Halls and that she went inside with the Appellant and his girlfriend to watch television. Mourray testified:

> His girl friend was fooling around with making Kool-Aid and what not, and they were kind of arguing back and forth about the television channels. They were having a hard time, you know, getting the right channel. He flipped past CNN and I kind of made fun of him. I was like, "I'm sure it's not on CNN," you know. And finally there was a brief trailer for like the upcoming newscasts, and it said that there was a fatality. And at that the [Appellant] got up and said, "Fuck," turned in a circle, walked into the kitchen.
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> At that point the girl friend started screaming, "I never should have let you go out; I never should have let you go out." They started arguing. It was kind of chaotic for two and a half, three minutes, I guess. They were just kind of jumbling about the living room and the kitchen.
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> The newscast came back on, and we all just sat down like snapped down into silence, watched the complete broadcast and I left shortly after it was over.

Mourray testified that she arrived back home in west Knoxville around 7:00 a.m. that morning.

Based upon the foregoing evidence, the jury convicted the Appellant of two counts of second degree murder, four counts of attempted second degree murder, three counts of aggravated assault, and four counts of reckless endangerment. Upon merger of the convictions by the trial court, the resulting convictions were as follows: one conviction for the second degree murder of Ms. Weimer; one conviction for the attempted second degree murder of Mr. Grande; one conviction for the attempted second degree murder of Ms. Grande; and one conviction for the aggravated assault of Mr. Dockins. The trial court sentenced the Appellant to twenty-three years for second degree murder, eleven years for each conviction for attempted second degree murder, and six years for aggravated

assault. The two attempted second degree murder convictions were run concurrently to one another, with the sentences for the remaining offenses running consecutively, resulting in an effective sentence of forty years in confinement.

Analysis

I. Charged Offense of First Degree Murder by Destructive Device

The Appellant, throughout his brief and at oral argument, repeatedly challenges the validity of his convictions for second degree murder and attempted second degree murder based upon count two of the State's indictment charging him with first degree murder by destructive device. Moreover, as a separate, but related issue, the Appellant argues that the trial court erred in submitting to the jury "its definition of a destructive device." The Appellant submits that, because a rock is not to be considered a "destructive device" under the disputed provision,[2] "any convictions from said counts are void." The State responds that the definition of "destructive device" is not at issue in this case, as the Appellant was ultimately acquitted by the jury of first degree murder by destructive device. The Appellant was convicted, based upon a theory of criminal responsibility for the conduct of another, of one count of second degree murder and two counts of criminal attempt to commit second degree murder. None of these offenses requires, as an element of proof, the use of a destructive device. As such, we agree with the State's argument that the definition of "destructive device" is not an issue appropriate for review in this case.[3]

II. Prior Knowledge of Case by Jury

The Appellant asserts that he was denied his right to a fair trial because of the jury's prior knowledge of the trial of co-defendant Morgan some two weeks prior to the Appellant's trial. Citing the transcript of the jury selection process before his trial, the Appellant argues, "Every potential

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[2]The provisions at issue, located at Tennessee Code Annotated section 39-13-202, provide in relevant part:

> (a) First degree murder is:
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> . . . .
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> (3) A killing of another committed as the result of the unlawful throwing, placing or discharging of a destructive device or bomb.
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> (b) No culpable mental state is required for conviction under subdivision (a)(2) or (a)(3) except the intent to commit the enumerated offenses or acts in such subdivisions.

[3]Moreover, based upon the manner in which the judgments of conviction for second degree murder were merged by the trial court, it is impossible to determine whether the Appellant's ultimate conviction for second degree murder stems from the lesser-included charge of first degree premeditated murder (count one) or from felony murder by destructive device (count two). Obviously, if the Appellant's conviction for second degree murder arose as a lesser-included offense of premeditated murder, the Appellant's argument is moot. The judgment of conviction forms for second degree murder in this case simply recite that the two counts merge without specifying which count survives. The concept of merger contemplates combining into a single conviction. Here, in effect, both convictions remain.

juror in the entire jury panel had heard about this case[,]" and, "[j]uror after juror indicated they knew another person had already been convicted of first degree murder." The Appellant stresses that "[n]ot one juror knew which first degree [murder] conviction Mr. Morgan had" and that most of the jurors indicated, during *voir dire*, that it "could be" or "might be" difficult to put their knowledge of the previous case out of their mind or bring in a different verdict. He states that he moved the trial court either to inform the jury what Morgan's convictions were or to dismiss the jury panel and continue the trial at a later date. The trial court, which the Appellant characterizes as having been "absolutely bent on having a jury," denied these motions and empaneled a jury. Relying upon Rule 24 of the Tennessee Rules of Criminal Procedure and this court's decision in *State v. Shepherd*, the Appellant argues that the jurors' knowledge of the prior case improperly and prejudicially influenced these jurors and effectively undermined the reliability of the trial result regardless of the jurors' good intentions.

The State asserts that the allegedly prejudicial knowledge possessed by jurors in the present case pertained not to the Appellant, but rather related to the conviction of a separately tried co-defendant, an issue which it asserts was irrelevant to the trial of the Appellant in his case. Further, the State asserts that the Appellant never sought a change of venue in this case. The State argues that, ultimately, the trial court was able to seat a fair and impartial jury, which affirmed that they could and would decide the case based solely upon the evidence presented.

The Appellant's reliance on Rule 24 of the Tennessee Rules of Criminal Procedure and *State v. Shepherd* is misplaced. Relative to challenges of prospective jurors for cause, Rule 24(b) provides, in part, as follows:

> Any party may challenge a prospective juror for cause if:
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> . . . .
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> (2) The prospective juror's exposure to potentially prejudicial information makes him unacceptable as a juror. Both the degree of exposure and the prospective juror's testimony as to his state of mind shall be considered in determining acceptability. A prospective juror who states that he will be unable to overcome his preconceptions shall be subject to challenge for cause no matter how slight his exposure. If he has seen or heard and if he remembers information that will be developed in the course of the trial, or that may be inadmissible but is not so prejudicial as to create a substantial risk that his judgment will be affected, his acceptability shall depend on whether his testimony as to impartiality is believed. If he admits to having formed an opinion, he shall be subject to challenge for cause unless the examination shows unequivocally that he can be impartial.

Tenn. R. Crim. P. 24(b); *see also State v. Shepherd*, 862 S.W.2d 557, 569 (Tenn. Crim. App. 1992).

The Appellant in this case cites only one prospective juror's response during *voir dire* to the question, "would it be hard to ignore Mr. Morgan's prior verdict?", as being illustrative of prejudices held by the prospective jurors:

> [prospective juror Byrd:] I think it might very well require anyone who's heard about that conviction to have to put that aside and think about what one individual's composition or responsibility might be. So I think in some ways, yes, it does . . . pose a challenge for everyone who might know. But not necessarily an insurmountable one.

We are unconvinced that this isolated remark by a single prospective juror, who was peremptorily challenged, illustrates partiality of the entire venire. Indeed, this statement fails to establish partiality even of this prospective juror. The Appellant places considerable emphasis on the response of "many" prospective jurors that it "could be" or "might be" difficult to put their knowledge of the previous case out of their mind or bring in a different verdict. However, the Appellant has failed to identify, or cite to the record, a specific response from any juror that would require this court to question his or her unequivocal impartiality.

Despite the Appellant's contention that he "literally begged the trial court to continue the trial,"[4] the record demonstrates that he never sought to obtain a change of venue in this case. Notwithstanding, we cite the following holding by this court regarding pretrial publicity and change of venue, as it appears germane to the Appellant's present argument:

> [P]rejudice will not be presumed on the mere showing of extensive pretrial publicity. *State v. Stapleton*, 638 S.W.2d 850, 856 (Tenn. Crim. App. 1982). In fact, jurors may possess knowledge of the facts of the case and may still be qualified to serve on the panel. *State v. Bates*, 804 S.W.2d 868, 877 (Tenn. 1991). The test is whether the jurors who actually sat on the panel and rendered the verdict and the sentence were prejudiced by the pretrial publicity. *State v. Crenshaw*, 64 S.W.3d 374, 386 (Tenn. Crim. App. 2001); *State v. Kyger*, 787 S.W.2d 13, 18-19 (Tenn. Crim. App. 1989). Furthermore, the scope and extent of *voir dire* is also left to the discretion of the trial court. *State v. Smith*, 993 S.W.2d 6, 28 (Tenn. 1999). Jurors who have been exposed to pretrial publicity may sit on the panel if they can demonstrate to the trial court that they can put aside what they have heard and decide the case on the evidence presented at trial. *State v. Gray*, 960 S.W.2d 598, 608 (Tenn. Crim. App. 1997).

State v. William Glenn Rogers, No. M2002-01798-CCA-R3-DD (Tenn. Crim. App. at Nashville, June 30, 2004), *aff'd* (Tenn., Feb. 17, 2006).

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[4] We are compelled to note that although the Appellant makes multiple references to the trial court's denial of his motion for continuance, his issue, as framed on appeal, focuses entirely upon a denial of due process based upon pre-trial publicity.

We would further note that the trial court instructed the jury in this case as follows:

> The guilt of one who is criminally responsible is not in any way affected by the conviction or acquittal of any other parties to the offense or if any other party has been convicted of a different type or class of offense or has been prosecuted or is immune from prosecution.

This instruction was consistent with Tennessee Code Annotated section 39-11-407, which provides:

> In a prosecution in which a person's criminal responsibility is based upon the conduct of another, the person may be convicted on proof of commission of the offense and that the person was a party to or facilitated its commission, and it is no defense that:
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> . . . .
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> (2) The person for whose conduct the defendant is criminally responsible has been acquitted, has not been prosecuted or convicted, has been convicted of a different offense or different type or class of offense, or is immune from prosecution.

T.C.A. § 39-11-407 (2006). Thus, the Appellant's assertion that the trial court erred by failing to instruct the jury as to the exact nature of co-defendant Morgan's convictions is inconsistent with the aforementioned statute. Moreover, we are satisfied that the trial court in this case committed no abuse of its discretion with regard to jury selection throughout the extensive *voir dire* proceedings in this case. This issue is without merit.

III. Trial Court's Jury Charge as to Second Degree Murder and Definition of "Knowingly"

The Appellant argues that the definition of "knowingly" provided by the trial court to the jury was erroneous and lessened the State's burden of proof on the corresponding charges. The Appellant correctly observes that second degree murder is a "result of conduct" offense, thus, the *mens rea* element applies only to the result that occurred. He argues, however, that the instruction erroneously permitted the jury to convict based solely on the Appellant's knowledge with regard to the nature of the conduct involved or the circumstances surrounding the Appellant's conduct. The State, relying on *State v. Faulkner*, 154 S.W.3d 48 (Tenn. 2005), responds that any alleged error in the jury charge was harmless, as the trial court correctly instructed the jury on the applicable result-of-conduct definition.

The Appellant was convicted of second degree murder, which is defined as "[a] knowing killing of another." T.C.A. § 39-13-210(a)(1) (2006). In *State v. Ducker*, 27 S.W.3d 889, 896 (Tenn. 2000), our supreme court explained that second degree murder is strictly a result-of-conduct offense. A result-of-conduct-offense requires that the culpable mental state accompany the result as opposed to the nature of the conduct. *Id.*

In its charge to the jury, the trial court in this case defined "knowingly" as follows:

> "Knowingly" means that a person acts knowingly with respect to the conduct or to the circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. *A person acts knowingly with respect to the result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result.*
>
> The requirement of knowingly is also established if it is shown that the defendant acted intentionally.

(emphasis provided). The trial court further instructed the jury as follows with regard to the elements necessary to convict a defendant for second degree murder:

> Any person who commits second degree murder is guilty of a crime.
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> For you to find the defendant guilty of this offense, the State must have proven beyond a reasonable doubt the existence of the following essential elements:
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> (1) that the defendant unlawfully killed the alleged victim; and
>
> (2) that the defendant acted knowingly.
>
> The requirement of "knowingly" is also established if it is shown that the defendant acted intentionally.

The trial court's jury instruction further provided: "'Intentionally' and 'knowingly' have been previously defined in these instructions."

The Appellant argues that the definition employed by the trial court improperly included the language regarding "nature of conduct" and "circumstances surrounding conduct." Specifically, he asserts that the trial court's instruction improperly allowed the jury to convict based solely upon an improper finding that the *mens rea* element of "knowingly" for second degree murder corresponded to the nature-of-conduct, rather than result-of-conduct. We respectfully disagree.

In support of his argument, the Appellant relies solely upon *State v. Page*, 81 S.W.3d 781, 788 (Tenn. Crim. App. 2002), in which this court held that "[a] jury instruction that allows a jury to convict on second degree murder based only upon awareness of the nature of the conduct or circumstances surrounding the conduct improperly lessens the [S]tate's burden of proof." The *Page* court, citing *Ducker*, 27 S.W.3d at 896, held that because a knowing second degree murder is strictly a result-of-conduct offense, "[t]he result of the conduct is the only conduct element of the offense; the 'nature of the conduct' that causes death is inconsequential" and that "[f]or second degree murder, a defendant must be aware that his or her conduct is reasonably certain to cause death."

Page, 81 S.W.3d at 787. Our supreme court in *State v. Faulkner* later clarified this holding as follows:

> We have not previously addressed the holding in *Page*. We agree that a proper instruction defining "knowingly" or "intentionally" does not include the nature-of-conduct and circumstances-surrounding-conduct language because second degree murder and first degree premeditated murder are result-of-conduct offenses. We are not convinced, however, that the inclusion of such language is an error of constitutional dimension when the instruction also includes the correct result-of-conduct definition.
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> . . . .
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> We have found no authority supporting the conclusion in *Page* that the erroneous instruction lessened the State's burden of proof. . . . The superfluous language in the "knowingly" definition did not lessen the burden of proof because it did not relieve the State of proving beyond a reasonable doubt that the defendant acted knowingly.

154 S.W.3d 48, 58-59 (Tenn. 2005).

This court has subsequently applied *Faulkner*, in analyzing a definition of "knowingly" identical to the one charged to the jury in the present case, and held that because the proper result-of-conduct language was used, a trial court's inclusion of the superfluous nature-of-conduct language in the "knowingly" definition did not lessen the burden of proof for the State and, therefore, constituted harmless error. *Terry Jamar Norris v. State*, No. W2005-01502-CCA-R3-PC (Tenn. Crim. App. at Jackson, July 26, 2006) (rejecting a petitioner's claim of ineffective assistance of counsel for failure to raise jury instruction issue on appeal). Likewise, we conclude that, because the correct result-of-conduct definition was charged to the jury in this case, the inclusion of superfluous nature-of-conduct language constituted harmless error. Accordingly, this issue is without merit.

IV. Sufficiency of the Evidence

The Appellant challenges the sufficiency of the evidence underlying his convictions. He alleges that the State introduced no evidence of the *mens rea* of Morgan or Kelley when they threw the aforementioned objects from the overpass. Citing his own statement to police and the trial testimony of defense witness Wright, the Appellant argues that he did not encourage the acts of Morgan or Kelley and that they jumped out of his van without his knowledge or approval when the rock, which killed Ms. Weimer, and the four-by-four wooden block, which damaged Dockins' truck, were thrown from the Brushy Valley overpass. He asserts that, based upon the evidence presented at trial, no rational juror could have found him guilty of second degree murder, attempted second degree murder, and aggravated assault. The Appellant additionally argues that the trial court erred by denying his motion for acquittal after the State concluded its case in chief.

The State contends that "the only reasonable inference raised under this record is that the codefendants acted with the requisite *mens rea* when they threw the wood board and the large rock onto the victims' vehicles[,]" and, likewise, that the evidence was legally sufficient for the jury to convict the Appellant for the underlying offenses based upon the theory of criminal responsibility. The State submits that a jury could reasonably conclude that, when Kelley and Morgan threw the board and rock from the overpass, they acted intentionally or knowingly as to the results of their conduct. Additionally, the State argues that a reasonable jury would be well within its authority to dismiss the Appellant's and Wright's assertions that the Appellant did not know about Kelly's and Morgan's intentions to throw rocks from the overpass. The State further asserts that a reasonable jury would be free to believe Dockins' statement that the white Astro van was stopped on the overpass and to disbelieve Wright's claims to the contrary.

Due process requires that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof, which is defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense. *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S. Ct. 2781, 2787 (1979). A jury conviction removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt, so that on appeal, a convicted defendant has the burden of demonstrating that the evidence is insufficient. *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982).

In our review of the issue of sufficiency of the evidence, the relevant question is "whether, after viewing the evidence in the light most favorable to the [State], *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789 (emphasis in original); *see also* Tenn. R. App. P. 13(e). Moreover, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). The weight and credibility of the witnesses' testimony are matters entrusted exclusively to the jury as triers of fact. *State v. Strickland*, 885 S.W.2d 85, 87 (Tenn. Crim. App. 1994).

Second degree murder is defined as "[a] knowing killing of another." T.C.A. § 39-13-210(a)(1). As relevant to the prosecution in this case:

> A person commits criminal attempt who, acting with the kind of culpability otherwise required for the offense . . . (2) acts with intent to cause a result that is an element of the offense, and believes the conduct will cause the result without further conduct on the person's part . . . .

Id. at § 39-12-101 (2006). As charged in count eleven of the presentment in this case, aggravated assault is committed when a person intentionally or knowingly commits an assault and uses or displays a deadly weapon. *Id.* at § 39-13-102 (2006).

The convictions of the Appellant, as the driver of the white Astro van in the early morning hours of May 24, 2004, were based upon the theory of criminal responsibility. As applicable to this case:

> A person is criminally responsible for an offense committed by the conduct of another, if:
>
> . . . .
>
> (2) Acting with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the person solicits, directs, aids, or attempts to aid another person to commit the offense; . . .

T.C.A. § 39-11-402 (2006). A person is criminally responsible as a party to an offense, if the offense is committed by the person's own conduct, by the conduct of another for which the person is criminally responsible, or by both. *Id.* at § 39-11-401(a) (2006). Each party to an offense may be charged with commission of the offense. *Id.* at § 39-11-401(b).

Even under the theory of criminal responsibility for the acts of another, mere presence during the commission of the crime is not enough to convict. *State v. Ball*, 973 S.W.2d 288, 293 (Tenn. Crim. App. 1998). Under a theory of criminal responsibility, an individual's presence and companionship with the perpetrator of a felony before and after the commission of an offense are circumstances from which his or her participation in the crime may be inferred. *State v. Caldwell*, 80 S.W.3d 31, 38 (Tenn. Crim. App. 2002). To be criminally responsible for the acts of another, the defendant must "in some way associate himself with the venture, act with knowledge that an offense is to be committed, and share in the criminal intent of the principal in the first degree." *Id.* at 38 (citing *State v. Maxey*, 898 S.W.2d 756, 757 (Tenn. Crim. App. 1994)).

It was clearly established at trial that the Appellant was the sole driver the of the white Astro van throughout the duration of the rock-throwing spree that took place in the early morning hours of May 24, 2004. Likewise, it appears undisputed in the record that the accomplice Morgan threw the rock, which killed Ms. Weimer, and Kelley threw the "four-by-four" piece of wood, which struck the tractor-trailer truck driven by Dockins, from the Brushy Valley overpass of Interstate 75. The testimony of Dockins that he saw a white Astro van sitting on the overpass as he drove under it was sufficient to permit a rational juror to infer that the Appellant stopped the van on the overpass with the intent to assist in the crimes, and, by doing so, he aided, or attempted to aid, Morgan and Kelley in the commission of the offenses. Likewise, a reasonable juror was entitled to infer that the Appellant associated himself with the venture, acted with knowledge that an offense was to be committed, and shared in the criminal intent of Morgan and Kelley. The jury, as trier of fact, was entitled to attribute little or no weight to the testimony of Wright or to the statement of the Appellant to police, claiming that the Appellant had expressed reluctance to participate in the events that transpired on the overpass, particularly considering the evidence of the Appellant's unconcerned demeanor soon after these events took place and his seemingly boastful statements to State's witness

Mourray when they saw news cameras at the crime scene. Upon complete review of the record, and viewing the evidence in a light most favorable to the State, we conclude that the evidence is legally sufficient to support the convictions of the Appellant for second degree murder, attempted second degree murder, and aggravated assault, under the theory of criminal responsibility.

V. Sentencing Issues

a. Length of Sentence

The Appellant asserts sentencing error by the trial court in its application of enhancement and mitigating factors which resulted in sentences "near or at the top" of the range for the corresponding offenses. The Appellant contends that neither the proof during the trial or sentencing supported application of the enhancement factors applied by the trial court. He also argues that the trial court erred by considering only one of his five proposed mitigating factors and that a proper balancing would have resulted in a sentence "at or near the bottom" of each conviction's range.

The Appellant and trial counsel engaged in a dialogue with the trial court at the sentencing hearing in this case, during which the Appellant orally stated his preference to waive his *ex post facto* rights to be sentenced under the pre-2005 sentencing provisions in effect at the time the offenses were committed, electing rather, to be sentenced under the June 7, 2005 sentencing amendments. The Compiler's Notes to Tennessee Code Annotated section 40-35-210 provide that

> [o]ffenses committed prior to June 7, 2005, shall be governed by prior law, which shall apply in all respects. However, for defendants who are sentenced after June 7, 2005, for offenses committed on or after July 1, 1982, the defendant may elect to be sentenced under the provisions of the act by executing a waiver of such defendant's ex post facto protections. Upon executing such a waiver, all provisions of the act shall apply to the defendant.

This court has held that such waiver must be written. *See State v. Sherry Sulfridge*, No. E2006-02220-CCA-R3-CD (Tenn. Crim. App. at Knoxville, Feb. 4, 2008) (citing *State v. Jarvis Harris*, No. W2006-02234-CCA-R3-CD (Tenn. Crim. App. at Jackson, Aug. 24, 2007); *State v. Marco M. Northern*, No. M2005-02336-CCA-R3-CD (Tenn. Crim. App. at Nashville, June 11, 2007)); *see also Black's Law Dictionary* 589 (7th ed. 1999) (defining "execute" as "[t]o make (a legal document) valid by signing"). Accordingly, we remand for sentencing under the pre-2005 sentencing provisions, which were in effect at the time of the crimes, as modified by *Gomez* II,[5] or, upon written waiver of *ex post facto* protections, the Appellant may elect to be sentenced under the June 7, 2005 sentencing amendments. At the re-sentencing hearing, neither the State nor the Appellant is confined to the proof at the prior hearing and may introduce additional proof as relevant to the hearing and as authorized by the sentencing act.

[5] *State v. Gomez*, 239 S.W.3d 733 (Tenn. 2007).

We recognize that distinctions exist with regard to the corresponding enhancement factors under the pre-2005 sentencing provisions and the 2005 sentencing amendments and, thus, their application may be dependent upon which sentencing provision is elected. Nonetheless, we extend review of those challenged enhancement factors found by the trial court as applicable under the 2005 amendments.

The Appellant challenges the application of the following factors: factor (2) the Appellant was a leader in the commission of the offense; factor (5) the Appellant treated or allowed a victim to be treated with exceptional cruelty; factor (10) the Appellant had no hesitation about committing a crime when the risk to human life was high; and factor (16) the Appellant was adjudicated to have committed a delinquent act as a juvenile that would constitute a felony if committed by an adult. T.C.A. § 40-35-114(2), (5), (10), & (16) (2006). The sentencing proof supports application of factor (5), that the Appellant allowed a victim to be treated with extreme cruelty. We are precluded from review of factor (16), because the pre-sentence report, which would reflect the juvenile adjudication, is not included in the record. In the absence of proof to the contrary, the application of this factor is presumed correct. We conclude, however, that the proof does not support application of enhancing factor (2), that the Appellant was the leader in the commission of the crime. The proof establishes that it was Kelley and Morgan who initiated the plan for "redneck fun" with Kelley and Morgan loading the van with rocks; that Kelley selected the routes; and that Kelley gave the direction when to stop. Moreover, we conclude that enhancement factor (10) is inapplicable to the Appellant's conviction for second degree murder because it is inherent within the offense. *See State v. Butler*, 900 S.W.2d 305, 313-14 (Tenn. Crim. App. 1994); *see also* T.C.A. § 40-35-114. However, factor (10) is applicable to the convictions for attempted second degree murder and aggravated assault. *See State v. Makoka*, 885 S.W.2d 366, 373 (Tenn. Crim. App. 1994); *see also State v. Jones*, 883 S.W.2d 597, 603 (Tenn. 1994).[6]

The Appellant argues that the trial court erred by not "balancing the applicable mitigating factors" with the "State's legitimate enhancement factors." This argument is misplaced. The 2005 sentencing amendment provisions no longer require a "balancing" or weighing of applicable enhancing and mitigating factors. *See* T.C.A. § 40-35-210(c)(2) (2006). Moreover, we are constrained to note that the trial court erred by starting at the midpoint of the applicable range for second degree murder.[7] This provision was deleted under the 2005 amendment. The amended provision now provides "[t]he minimum sentence within the range of punishment is the sentence which should be imposed. . . ." T.C.A. § 40-35-210(c)(1).

b. Consecutive Sentencing

[6] This analysis illustrates the need for the trial court to consider application of the appropriate factors to each conviction.

[7] With regard to its sentencing decision as to this offense, the trial court stated: "Now with regard to count one, second degree murder of Ms. [Weimer], I'm going to start at the mid range."

In imposing partial consecutive sentences, the trial court relied primarily[8] upon the finding that the Appellant was a dangerous offender. T.C.A. § 40-35-115(4) (2006). As our supreme court decisions have held, this sole finding does not end the inquiry as to whether consecutive sentences may be imposed. Case law clearly holds that in addition to finding that a defendant meets one of the statutory classifications of Tennessee Code Annotated section 40-35-115 for consecutive sentencing, the trial court must find that "(1) the [aggregate] sentences are necessary in order to protect the public from further misconduct by the defendant, *State v. Wilkerson*, 905 S.W.2d 933, 938 (Tenn. 1995); and (2) 'the [aggregate sentence] terms are reasonably related to the severity of the offenses.'" *State v. Taylor*, 739 S.W.2d 227, 230 (Tenn. 1987); *see also* T.C.A. § 40-35-115, Sentencing Commission Comments. ("Consecutive sentences should not routinely be imposed in criminal cases, and the aggregate maximum of consecutive terms must be reasonably related to the severity of the offenses involved.") The record fails to reflect consideration of either of these requirements. Accordingly, in view of the necessity for remand for determination of the proper length of sentences, we likewise remand for determination of the propriety of consecutive sentencing.

CONCLUSION

Based upon the foregoing, the Appellant's judgments of conviction for the offenses of second degree murder, two counts of attempted second degree murder, and aggravated assault are affirmed. The sentences imposed for these respective offenses are vacated with remand to the trial court for a sentencing hearing and for the election by the Appellant of either sentencing under the pre-2005 sentencing law or sentencing under the 2005 sentencing amendments with waiver of *ex post facto* protections. Moreover, we remand for the determination of the propriety of consecutive sentences consistent with this opinion.

_____

DAVID G. HAYES, JUDGE

[8] The trial court also found that consecutive sentences were necessary to avoid depreciating the seriousness of the offenses. The Appellant argues, and we would agree, that this finding is not an appropriate sentencing consideration for the imposition of consecutive sentences.